

STATE OF MICHIGAN
COURT OF APPEALS

DEANNE MARIE MIMS,

Plaintiff,

v

SHEREE L. SCOTT,

Defendant-Appellant,

and

KARL J. MAYRY,

Defendant-Appellee.

UNPUBLISHED

May 28, 1999

No. 211857

Monroe Circuit Court

Family Division

LC No. 96-004584 DC

DEANNE MARIE MIMS,

Plaintiff-Appellant,

v

SHEREE L. SCOTT and KARL J. MAYRY,

Defendants-Appellees.

No. 211939

Monroe Circuit Court

Family Division

LC No. 96-004584 DC

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, appellant Sheree L. Scott, who is the natural mother of Cassandra Martin (hereinafter “Cassie”), and appellant Deanne Mims Painter, who is Cassie’s maternal aunt and legal guardian, appeal as of right from an order granting primary physical custody of then eight-

year-old Cassie to appellee Karl Mayry, Cassie's father. On appeal, Scott and Painter both contend, as they did below, that custody of Cassie should remain with Painter.¹ We affirm.

I

Custody disputes are to be resolved in a child's best interests, as measured by the twelve statutory factors set forth in MCL 722.23; MSA 25.312(3). *Deel v Deel*, 113 Mich App 556, 559; 317 NW2d 685 (1982). Similarly, a custody award may be modified on a showing of proper cause or change of circumstances establishing that modification is in the child's best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c), *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). A trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23; MSA 25.13(3). A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). All custody orders must be affirmed on appeal unless the trial court's findings are against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear error on a major issue. MCL 722.28; MSA 25.312(8), *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997).

Where, as here, a natural parent seeks custody from a third party who has provided an established custodial environment for the child, two statutory presumptions conflict². On the one hand, MCL 722.25; MSA 25.312(5) provides a presumption that the best interests of the child is served by awarding custody to the parent unless the contrary is established by clear and convincing evidence. On the other hand, MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides that courts are not to change the established custodial environment of a child absent clear and convincing evidence that it is in the best interest of the child. The existence of these conflicting "presumptions reduces the burden of persuasion from clear and convincing [evidence] to a preponderance of the evidence," and places that burden of persuasion on the parent challenging the established custodial environment in the home of the third party. *Rummelt v Anderson*, 196 Mich App 491, 496; 493 NW2d 434 (1992). See also *Straub v Straub*, 209 Mich App 77, 79-80; 530 NW2d 125 (1995).

Here, the trial court found that neither party had an appreciable advantage over the other on the best interests factors. (Inconsistently, the trial court at one point stated orally that it was "practically a tie between the father and the guardian", but stated in its written opinion that Painter prevailed on the best interests factors.) The trial court decided that the public policy of placing children with natural parents would serve to break the tie in Mayry's favor. On appeal, Painter challenges the trial court's findings of fact on the best interests factors, and its application of the law to those findings.

II

Evaluating the statutory best interest factors, MCL 722.23; MSA 25.312(3), the trial court determined that Painter prevailed on factors (a), love and emotional ties with child, and (i), child's preference. With respect to factor (d), length of time child has lived in a stable environment, and the

desirability of maintaining continuity, the trial court divided the factor into two parts, with Painter prevailing on the first part and Painter and Mayry tied on the second. The court found that Mayry “slightly” prevailed on factor (f), moral fitness, and (j), willingness of party to encourage the child’s continuing relationship with the adverse party. Factor (l) allows the court to consider any other factor which is relevant to a particular dispute. The trial court used factor (l) to consider the public policy favoring placement with natural parents, and concluded that this factor favored Mayry. The trial court determined that the parties were either equal on the remaining factors, or that they were not applicable to the circumstances.

Painter contends that the trial court’s findings of fact on factors (d) (second part), (f), (j), and (l) were clearly erroneous. We disagree. With regard to (f), moral fitness, we find no error in the trial court’s determination that Painter placed Cassie at risk by exposing her to strange men Painter located on the Internet for romantic liaisons. The court’s finding on factor (j) was supported by evidence that Painter curtailed Mayry’s visitation with Cassie after Mayry petitioned for termination of Painter’s guardianship. We also find no clear error with respect to the second part of factor (d), where the trial court found a “draw” between the parties as to the desirability of continued placement with Painter of Mayry. Additionally, we note that the trial court did not really make findings of fact under factor (l).

After evaluating the best interest factors, the trial court determined that it was “practically a tie between the father and the guardian, with the mother behind them”. Because the parties “tied” after the best interests factors were tallied up, the trial court decided that the public policy in favor of placing children with their natural parents would be the “tiebreaker”, favoring Mayry.

III

Painter argues that because, numerically, she prevailed on more “best interests” factors than Mayry (other than natural parent status), Mayry failed to prove, by a preponderance of the evidence, that the change of custody was in Cassie’s best interests. She emphasizes that the trial court never articulated a finding that Mayry met his burden of proof and persuasion that he prevailed on the best interests factors. She argues that the trial court’s decision is contrary to this Court’s holdings in *Rummelt*, *supra*, and *Straub*, *supra*.

The trial court is not obligated to give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain*, 229 Mich App 130-131. *Rummelt*, *supra*, does not dictate such an application of the best interests factors. We therefore decline to treat the best interests factors analysis as a mathematical formula where each party is awarded a numerical score which is then binding on the trial court.

Indeed, this Court took a more flexible, ad hoc approach to the best interests factors in *Straub*, *supra*, a case bearing pertinent factual similarities to this case. In *Straub*, the defendant mother appealed the denial of her petition for a change of custody of her minor daughter from the daughter’s paternal grandparents to herself. During her divorce from the plaintiff, Mark Straub, the defendant voluntarily placed her daughter, Crystal, with Crystal’s paternal grandparents. It was understood that this was to be a temporary arrangement, and that the defendant would regain custody once she was

able to provide a stable home for Crystal. The evidence presented at the custody hearing indicated that the best interest factors were equal between the parties. In this context, this Court stated:

Given defendant had the burden of proving by a preponderance of the evidence that Crystal's best interests would be served if custody were given to defendant, and now having concluded the evidence presented indicated the best interest factors were equal between the parties, it would appear the trial court reached the correct result. However, we find the court erred in failing properly to consider one additional factor. Defendant voluntarily relinquished custody of Crystal with the understanding that the arrangement was to be temporary. Because all of the parties agreed this was the understanding at the time the grandparents obtained custody, the trial court's finding to the contrary is against the great weight of the evidence. This Court has determined it to be good public policy to encourage parents to transfer custody of their children to others temporarily when they are in difficulty by returning custody when they have solved their difficulty. Application of this policy here tips an otherwise equal scale in defendant's favor. [*Straub, supra* at 80-81. Citations omitted.]

In this case, while there was no evidence that Scott and Painter ever contemplated or decided that the guardianship would be temporary, neither was there any evidence that they ever decided or agreed that it would be permanent. Initially, Scott placed Cassie with Painter because Scott had been in an accident and had other troubles which interfered with parenting. These circumstances suggest a temporary, or at least indefinite, arrangement while Scott took control of her life. The guardianship gradually evolved into a de facto permanent arrangement as it began to appear that Scott was building a life for herself which did not include becoming a custodial parent for Cassie. Under these circumstances, we cannot say that Scott and Painter ever decided one way or the other with respect to the permanence of Cassie's placement with Painter.

Once paternity was established, Mayry filed a formal consent to the guardianship in the probate court. Mayry offered no evidence that he intended the custodial arrangement to be temporary in nature when he consented to the guardianship. However, there is no evidence that Mayry intended for Painter to have permanent custody of Cassie. In the converse of Scott's experience, it appears that Mayry's life evolved to the point where he felt ready and able to assume custody of his daughter.

Given Mayry's increased involvement in Cassie's life and commitment to fatherhood, we cannot say that the trial court's findings of fact with regard to the best interests factors, or his decision to resolve the matter in Mayry's favor, were clearly erroneous. On this record, we cannot say that the trial court abused its discretion in awarding custody to Mayry. *Straub, supra* at 80-81; MCL 722.28; MSA 25.312(8).

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

¹ Although Scott seeks custody in the event that Painter does not prevail, this is essentially a dispute between Painter and Mayry.

² There is no dispute that there was an established custodial environment with Painter.